DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Save for the cover sheet, this decision may be made public (rule 14(7) of the Tribunal Procedure (Upper Tribunal) rules 2008 (SI 2008/2698)). That sheet, which identifies the patient by name, is not formally part of the decision.

The decision of the Upper Tribunal is that:

(i) the First-tier Tribunal's decision on 17 April 2019 to make a rule 11(7)(b) appointment involved a material error of law. However, I exercise my discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 not to set aside the appointment;

(ii) the First-tier Tribunal's decision on 10 May 2019 not to rescind the rule 11(7)(b) appointment involved a material error of law. However, I exercise my discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 not to set aside the decision;

(iii) the First-tier Tribunal's decision on 15 May 2019 not to discharge the Appellant does not involve a material error of law.

This decision is given under sections 11 and 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

Introduction

1. This appeal turns on the operation of regulation 11(7)(b) of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care) Rules 2008 (SI 2008/2699), which provides that the Tribunal may appoint a legal representative for a mental health appellant. This applies where "the patient lacks the capacity to appoint a representative but the Tribunal believes that it is in the patient's best interests for the patient to be represented". The issue that arises in this appeal concerns the situation where a rule 11(7)(b) appointment has been properly made by the Tribunal but the patient subsequently wishes to change his legal representative in circumstances where there may be a question mark over his capacity.

The factual background

2. The Appellant SB is a man aged 43 who has suffered from enduring mental health problems since childhood; at various times he has received diagnoses of ADHD, OCD and ASD. In October 2018 he was detained at one of the Respondent's hospitals for treatment under section 3 of the Mental Health Act 1983. This detention

was followed by 22 sessions of ECT. On 1 April 2019, in accordance with the regime of the 1983 Act, the Hospital Manager made a reference to the Tribunal at the end of that first period (at least for present purposes) of detention. The Respondent also referred the Appellant to the Tribunal for appointment of a representative under rule 11(7).

3. On 16 April 2019 the Tribunal both (i) issued the Respondent with Form MH3 (the 'Direction for Capacity Evidence' form (which was swiftly completed and returned by the Respondent's Ward Social Worker); and (ii) contacted ADJ Law Solicitors to enquire whether they would be prepared to accept appointment to act for the Appellant under rule 11(7). Later the same day ADJ Law indicated their willingness to act as such.

4. The following day (17 April 2019) the Tribunal issued a Direction in the standard form (Form MH6b), appointing ADJ Law as the Appellant's legal representative, the 'free text' part of which read as follows:

> "The tribunal has received evidence, which it accepts, that the patient lacks the capacity to appoint a representative, and the tribunal believes it is in the patient's best interests to be represented.
>
> Therefore, in the exercise of powers delegated to tribunal staff under the Senior President's Practice Direction in relation to the Delegation of Functions, the tribunal directs that a legal representative (who is a member of the Law Society's Mental Health Tribunal Accreditation Scheme) is to be appointed for this patient under Rule 11(7)(b)."

5. Three weeks later (on 7 May 2019), and about a week before the hearing, the Appellant's mother (and his nearest relative under the 1983 Act) helped him to contact the Tribunal office to request that he be represented by Campbell-Taylor Solicitors. This firm had represented the Appellant previously in the course of 2006, 2009 and 2016. The Tribunal promptly contacted ADJ Law by e-mail and asked as follows: "I note that you are currently acting for this patient on our system. Do you object to authority being transferred?" ADJ Law replied the following day (8 May 2019) in these terms:

> "Thank you for your email. I confirm I object to the authority being transferred. Please be informed I have been appointed under Rule 11(7)(b) as my client lacks capacity to instruct solicitors. I further confirm I met with [SB] on Thursday, 2 May 2019 and he continues to lack capacity to instruct solicitors."

6. The next day (9 May 2019) Campbell-Taylor Solicitors e-mailed the Tribunal (1) a Consent Form signed by the Appellant, declaring that he wished to be represented by that firm, and in addition (2) a Change of Solicitor Authority Form, again signed by the Appellant but also counter-signed by his mother. The e-mail added the information that "We met the client today on the ward, and understand that the client's mother has been in touch with the Tribunal, and we would appreciate confirmation that we are now on the record as the Solicitor." This was followed up the same day by the new solicitors making a telephone call to the Tribunal, "checking if we are on the record", with their file note including the Tribunal's response that "we have to check if other solicitor consents". The Tribunal's own clerical note on 9 May 2019 of these exchanges was as follows (with all original abbreviations):

> "Campbell Taylor sol[icitors] have sent in TOA [transfer of authority] with LOA [letter of authority] fr[o]m patient – they visited patient who does have capacity to

> req[ue]st changes of reps [representation] – confirmed rec[ei]pt of corrie [correspondence] awaiting to be dealt with."

7. On Friday 10 May 2019 Campbell-Taylor Solicitors telephoned the Tribunal again, to be advised "that they have received our emails containing change of solicitor information and would be in touch on Monday as it takes 48 hours usually" (file note). However, later the same day the Tribunal e-mailed Campbell-Taylor Solicitors as follows:

> "Further to your email, ADJ Law have informed the Tribunal they object to the transfer of solicitors as they are appointed under rule 11B [sic]. They will therefore remain on record as acting. Please liaise with them further if you believe the patient has capacity then we will need a new capacity statement."

8. As the matter was scheduled for hearing on Wednesday 15 May 2019 (by then only 3 working days away), Campbell-Taylor Solicitors did not take any further action at that stage, deciding it was inappropriate to disrupt the existing instruction. The hearing duly went ahead with ADJ Law representing. The Appellant was not discharged by the Tribunal. However, shortly afterwards (about 3-4 weeks later, in the course of week ending 14 June 2019) he was discharged from hospital by the Respondent and went back to live with his mother.

9. Around the same time Campbell-Taylor Solicitors accepted new instructions to act for the Appellant on an application for permission to appeal regarding issues around his capacity and the change of solicitor in the context of rule 11(7)(b). Shortly before his discharge Campbell-Taylor Solicitors visited the Appellant, who signed a fresh Consent Form and completed a brief capacity test based on the decision of Upper Tribunal Judge Jacobs in *VS v St Andrew's Healthcare* [2018] UKUT 250 (AAC).

The application for permission to appeal to the Upper Tribunal

10. The Appellant's primary ground of appeal at this stage was that the Tribunal's refusal, having made a rule 11(7)(b) appointment, to accede to his request to instruct new solicitors undermined the integrity of the proceedings, and/or his participation in those proceedings, to the extent that they were invalid and should be set aside. The grounds did not suggest that rule 11(7)(b) itself was flawed, rather that it was operated unfairly in the circumstances of his case: "no objection is made as to the general operation of the rule. It is only when the patient expresses a wish to change legal representative that it is suggested that either (i) the rule itself or (ii) the way that the Tribunal Office operates the rule, is unfair and … unlawful."

11. On 20 June 2019 Judge Gledhill gave permission to appeal, observing that "I am unable to find a clear error of law in the decision of the FTT however the grounds of appeal raise issues upon which guidance is needed." The Judge also directed that disclosure of all relevant documents should be granted to Campbell-Taylor Solicitors.

The proceedings in the Upper Tribunal

12. The Appellant's representative has helpfully provided detailed written submissions in the notice of appeal, as well as making a series of supplementary observations. As is typically the case in mental health appeals at this level, the Respondent NHS Trust has made no submission and indeed played no part in the Upper Tribunal proceedings. There has been no application for an oral hearing and I am satisfied it is fair and just to deal with this appeal 'on the papers.' My reasons and conclusions are as follows, subject only to the caveat that they have been reached

without the benefit of full *inter partes* argument. I start with the framework provided by the HESC Rules.

The HESC procedural rules

13. For present purposes the relevant provisions of the HESC Rules are rules 2, 4 and 11:

> **Overriding objective and parties' obligation to co-operate with the tribunal**
> **2.**—(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
> (2) Dealing with a case fairly and justly includes—
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
> (d) using any special expertise of the Tribunal effectively; and
> (e) avoiding delay, so far as compatible with proper consideration of the issues.
> (3) The Tribunal must seek to give effect to the overriding objective when it—
> (a) exercises any power under these Rules; or
> (b) interprets any rule or practice direction.
> (4) Parties must—
> (a) help the Tribunal to further the overriding objective; and
> (b) co-operate with the Tribunal generally.
>
> **Delegation to staff**
> **4.**—(1) Staff appointed under section 40(1) of the 2007 Act (tribunal staff and services) may, with the approval of the Senior President of Tribunals, carry out functions of a judicial nature permitted or required to be done by the Tribunal.
> (2) The approval referred to at paragraph (1) may apply generally to the carrying out of specified functions by members of staff of a specified description in specified circumstances.
> (3) Within 14 days after the date on which the Tribunal sends notice of a decision made by a member of staff pursuant to an approval under paragraph (1) to a party, that party may apply in writing to the Tribunal for that decision to be considered afresh by a judge.
>
> **Representatives**
> **11.**—(1) A party may appoint a representative (whether a legal representative or not) to represent that party in the proceedings.
> …
> (4) A person who receives due notice of the appointment of a representative—
> (a) must provide to the representative any document which is required to be provided to the represented party, and need not provide that document to the represented party; and
> (b) may assume that the representative is and remains authorised as such until they receive written notification that this is not so from the representative or the represented party.
> …
> (7) In a mental health case, if the patient has not appointed a representative, the Tribunal may appoint a legal representative for the patient where—
> (a) the patient has stated that they do not wish to conduct their own case or that they wish to be represented; or

> (b) the patient lacks the capacity to appoint a representative but the Tribunal believes that it is in the patient's best interests for the patient to be represented.

14. The HESC Rules are supplemented by the Senior President's Practice Statement on the Delegation of Functions, to which I turn next.

The Senior President's Practice Statement on the Delegation of Functions

15. Section 40(1) of the Tribunals, Courts and Enforcement Act (TCEA) 2007 provides that "The Lord Chancellor may appoint such staff as appear to him appropriate for the purpose of discharging his general duty in relation to the tribunals." Further to this, the Senior President's Practice Statement on the *Delegation of Functions to Registrars, Tribunal Case Workers and authorised tribunal staff on or after 8 July 2016* for the First-tier Tribunal (HESC) (Mental Health) jurisdiction provides that certain designated staff may exercise the power "under rule 11(7), to appoint a legal representative for the patient" (paragraphs 2(f) and 3(e)). The Practice Statement further provides as follows:

> "4. In accordance with rule 4(3) of the Tribunal Procedure (First Tier Tribunal) (Health Education and Social Care Chamber) Rules 2008, within 14 days after the date that the tribunal sends notice of a decision made by an authorised member of tribunal staff (pursuant to an approval under paragraph 2 above), or a Registrar or Tribunal Case Worker (pursuant to an approval under paragraph 3 above) to a party or person, that party or person may apply in writing to the tribunal for the decision to be considered afresh and, if so, it will be considered afresh by a judge or, under paragraph 3(l) or 3(m) above, by a Registrar or Tribunal Case Worker, as appropriate."

The Upper Tribunal's analysis

Introduction

16. The Appellant's grounds of appeal to the Upper Tribunal, as originally drafted and revised before the First-tier Tribunal and as subsequently supplemented in the proceedings before the Upper Tribunal, challenge three decisions of the First-tier Tribunal. The first was the original decision of 17 April 2019 to make the rule 11(7)(b) appointment. The second was the decision of 10 May 2019 to refuse to act on the evidence of new instructions and to rescind the rule 11(7)(b) appointment. The third was the substantive decision of the First-tier Tribunal following the oral hearing on 15 May 2019. I deal with each of these in turn.

The original decision of 17 April 2019 to make a rule 11(7)(b) appointment

17. In the grounds of appeal, the Appellant's solicitors make detailed criticisms of the format and content of Form MH3. They argue that the questions posed on the form do not reflect best practice and involve procedural irregularities. They further submit that the Form MH6b is flawed by procedural irregularity (e.g. the failure to specify the evidence relied upon). These are wide-ranging submissions, but I have concluded they do not need to be addressed in this decision. The reason for that is this is an inquisitorial jurisdiction and I have concluded the Form MH6b was defective in another and narrower procedural respect.

18. Form MH6b included at the end of the Direction making the appointment the following 'Notice': "If a party, or any person given notice of these directions, wishes to challenge a direction, they may do so by applying for another direction that amends, suspends or sets aside the first direction". That 'Notice' is entirely appropriate where the Tribunal is making a case management direction under rule 5, as it reflects the proper procedure under rule 6(5) of the HESC Rules. However, it is not the correct

form of words where an appointment has been made under rule 11(7) using the delegated powers. In that situation, the recipient must be advised to the effect that "within 14 days after the date on which the Tribunal sends notice of a decision made by a member of staff pursuant to an approval under paragraph (1) to a party, that party may apply in writing to the Tribunal for that decision to be considered afresh by a judge" (see rule 4(3) and also paragraph 4 of the Practice Statement). By way of example, in the General Regulatory Chamber of the First-tier Tribunal, decisions taken by a registrar which are subject to the rule 4(3) right of review typically include the following rubric at the end (emphasis as in the original):

> "This decision was made by the Tribunal Registrar. A party is entitled to apply in writing within 14 calendar days of the date this document is sent for this decision to be considered afresh. If you apply later than 14 days you must explain why you are late."

19. Obviously, the proper wording on the Form MH6b for a rule 11(7)(b) appointment would need to take account of the fact that appointments may be made by other staff and then subject to a rule 4(3) review by a registrar (see paragraph 3(l) and (m) of the Practice Statement). Be that as it may, this error in the Form MH6b was material. The official notification, giving no time limit, failed to impress on the Appellant the urgency of mounting a challenge to the rule 11(7)(b) appointment. If the correct information had been included, the Appellant may well have acted in good time with the result that the attempt to have his new solicitors put on the record would not have taken place only a matter of a few days before the Tribunal hearing, by which time it was effectively too late. It follows that the standard form MH6b as issued by the Tribunal in the present case was defective.

20. I also note that the Form MH6b referred to the powers having been delegated to tribunal staff under the Senior President's Practice Direction, when in fact the relevant authority is derived from the Senior President's Practice Statement. However, this latter error was in no way material to the issues in this appeal. Likewise, as the Appellant's representative rightly points out, the Form MH6b was also in error in describing the Appellant as "a patient liable to be detained under Section 68(2) Mental Health Act 1983", which was the *referral* provision and not the *detention* provision (that being section 3). Again, this mistake was not material.

21. My conclusion is that the Tribunal's decision on 17 April 2019 to make a rule 11(7)(b) appointment, as communicated by Form MH6b, involved a material error of law. Given the appointment has long since been overtaken by events, there is no need formally to set aside the Tribunal's decision. Accordingly, I exercise my discretion under section 12(2)(a) of TCEA 2007 not to set aside the appointment. For that reason, I have not considered it appropriate to join ADJ Law as a party to these proceedings or otherwise to invite their submissions on this appeal. There has been no suggestion that their conduct of the proceedings was in any way other than proper.

The decision of 10 May 2019 to refuse to rescind the rule 11(7)(b) appointment

22. The prime focus of the Appellant's grounds of appeal throughout these proceedings has been the Tribunal's decision not to rescind the rule 11(7)(b) appointment and instead to recognise the Appellant's wish to have new solicitors instructed. The challenge has been put on several different levels, ranging from a submission that rule 11(7)(b) was not properly interpreted and applied on the facts of this case to a much wider attack to its lawfulness, premised on the European Convention on Human Rights (ECHR) and the UN Convention on the Rights of Persons with Disabilities (UNCRPD). In my view it is neither necessary nor

proportionate to address those latter submissions, especially in the absence of full *inter partes* argument, and they can await another day. Rather, it is sufficient to consider the Tribunal's refusal to reopen the rule 11(7)(b) appointment through the prism of fairness and in the context of the factual matrix of this appeal.

23. The starting point is to consider the nature of the decision in question itself. It will be recalled that the Tribunal's decision, as communicated by e-mail, was as follows:

> "Further to your email, ADJ Law have informed the Tribunal they object to the transfer of solicitors as they are appointed under rule 11B [sic]. They will therefore remain on record as acting. Please liaise with them further if you believe the patient has capacity then we will need a new capacity statement."

24. This e-mail can only be a read as a refusal to review the rule 11(7)(b) appointment and so to refuse to accept the Appellant's notification of his wish to have new legal representatives ("They [i.e. the Tribunal-appointed solicitors] will therefore remain on record as acting"). The Appellant's solicitors have described this determination as "not a judicial act". This is not quite the whole story. There is certainly no suggestion from the file that a Tribunal Judge applied her or his mind to the issues. I also recognise that there is a common practice across First-tier Tribunal Chambers to relay judicial case management decisions to parties in the text of e-mails, without any formality, but they are usually prefaced by a tell-tale phrase such as "The Judge directs that…" or even simply "The Judge says that…".

25. However, this does not mean that the e-mail of 10 May 2019 was other than an adjudicative act, albeit one that was made in consequence of a delegated judicial function. Tribunal Registrars and Case Workers, where authorised by the Chamber President or Deputy Chamber President (HESC), have the power to make nearly all types of case management decisions (see paragraph 3(a) of the Senior President's Practice Statement above). Given that rule 11 of the HESC Rules makes no specific provision for the process by which appointments of legal representatives under rule 11(7)(b) are to be reviewed and/or revoked, this could only be done by way of a case management decision under rule 5. However, there are several difficulties with the way in which this decision was reached.

26. First, there is no guarantee that the proper decision-making process was carried out by the Tribunal. The very fact that the right to review under rule 4(3) was not properly notified to the Appellant (and/or his mother) does not inspire confidence that the process that was adopted indeed complied with the requirements of the Senior President's Practice Statement.

27. Second, the important principle that a "person must be assumed to have capacity unless it is established that he lacks capacity" (Mental Capacity Act 2005, section 1(2)) was not accorded sufficient weight when the Tribunal was faced with the new evidence of instruction. It is true, of course, that there had been an earlier finding as to lack of capacity, but a person's capacity is not fixed for all time. Moreover, this was a case in which a solicitor had provided a consent form and transfer of authority form (signed by the Appellant and in the case of the latter also by the nearest relative) and had advised the Tribunal office on 9 May 2019 that "they [had] visited patient who does have capacity to req[ue]st changes of reps [representation]". There is no evidence this important development was drawn to the attention of a Tribunal Registrar or Tribunal Judge.

28. Third, the Tribunal's approach seemingly ignored the principle that the test of capacity is a lower test than the capacity required to conduct proceedings (see e.g. *R*

(on the application of H) v Secretary of State for Health [2005] UKHL 60 and *VS v St Andrew's Healthcare* [2018] UKUT 250 (AAC).

29. Fourth, the only reason advanced by the Tribunal for its decision was that the solicitors appointed under rule 11(7)(b) had objected in circumstances where it was clear there was a difference of view as to the Appellant's capacity to instruct legal representatives (which in and of itself indicated that the matter needed to be reviewed by a registrar or judge). It cannot be right that a prior appointment under rule 11(7)(b) necessarily trumps any other consideration – not least given the importance of having regard to the patient's wishes and feelings and those of his nearest relative (see further section 4 of the Mental Capacity Act 2005) and the overriding objective which includes "ensuring, so far as practicable, that the parties are able to participate fully in the proceedings" (HESC Rules, rule 2(2)(c)). The effect of the Tribunal's decision was to abdicate decision-making responsibility and to accept the default position based on the existing solicitors' assessment of the Appellant's capacity – the very issue which should have been determinative of the question as to whether the rule 11(7)(b) appointment should remain in place.

30. The cumulative impact of these factors is such that the decision in question was tainted by fundamental unfairness. My conclusion is accordingly that the Tribunal's decision on 10 May 2019 not to rescind, or to consider rescinding, the rule 11(7)(b) appointment involved a material error of law. Given that refusal has again long since been overtaken by events, there is no need formally to set aside the Tribunal's refusal. Accordingly, I exercise my discretion under section 12(2)(a) of TCEA 2007 not to set aside the refusal. For that reason, and as above, I have not considered it appropriate to join ADJ Law as a party to these proceedings or otherwise to invite their submissions on this appeal.

The substantive decision of the First-tier Tribunal at the oral hearing on 15 May 2019

31. The Appellant also challenges the substantive decision of the First-tier Tribunal at the oral hearing on 15 May 2019. In fairness the challenge is not put with any great vigour. The Appellant's representative accepts that the Tribunal did not make any error of law in either the conduct of the hearing on 15 May 2019 or (subject to one qualification; see below) in the written reasons for its decision. At its highest, the challenge is that the fairness of the hearing was undermined by the Tribunal's previous refusal to allow the Appellant to change his solicitors. It is also suggested that the Tribunal's closing statement in its reasons (namely that "there were no special circumstances to indicate the exercise of our discretion") was inaccurate and involved an error of law.

32. I am not persuaded that the substantive decision of the First-tier Tribunal was flawed in any material respect. In arriving at that conclusion, I bear in mind that the Appellant had the benefit of legal representation at the hearing (and, as previously noted, there has been no suggestion that the representation by the appointed firm was other than professional and competent). My conclusion is that the decision of the Tribunal dated 15 May 2019 does not involve any material error of law. If I happen to be wrong about that, and the refusal to rescind the rule 11(7)(b) appointment and so to recognise the Appellant as having instructed new solicitors is seen as fatal to the Tribunal's substantive decision, then I would in any event decline to set aside that decision. As with the original appointment decision, the Tribunal's substantive decision has long since been overtaken by events and there is no need formally to set it aside. So, in the alternative, I would exercise my discretion under section 12(2)(a) of TCEA 2007 not to set aside the substantive decision.

Conclusion

33. This appeal succeeds in part at least. To summarise, my decision is as follows:

> **The decision of the Upper Tribunal is that:**
>
> **(i) the First-tier Tribunal's decision on 17 April 2019 to make a rule 11(7)(b) appointment involved a material error of law. However, I exercise my discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 not to set aside the appointment;**
>
> **(ii) the First-tier Tribunal's decision on 10 May 2019 not to rescind the rule 11(7)(b) appointment involved a material error of law. However, I exercise my discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 not to set aside the decision;**
>
> **(iii) the First-tier Tribunal's decision on 15 May 2019 not to discharge the Appellant does not involve a material error of law.**

34. Finally, the Appellant seeks damages to be assessed to compensate him for the frustration, humiliation and distress which he has experienced. Such a remedy would have to be sought elsewhere, as the Upper Tribunal has no power under TCEA 2007 or otherwise to make an award of damages on a statutory appeal.

35. In the light of my observations at paragraphs 17-21 above, I would just suggest that those responsible for the standard rubric on the MH6b form should ensure that there is appropriate reference to the time-limited option of a rule 4(3) review. I do not make any formal direction to that effect, partly as it would not be appropriate to do so but partly because I have no way of knowing if the form used in the present appeal was a "one-off" or indicative of a more systemic problem.

Signed on the original
on 30 January 2020

Nicholas Wikeley
Judge of the Upper Tribunal